

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2016AP1945-CR

Cir. Ct. Nos. 2014CF542

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDY J. PARISI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Andrew J. Parisi appeals a judgment entered after a jury found him guilty of ten drug-related offenses occurring on two separate occasions and an order denying his postconviction motion for a new trial. Parisi maintains that he is entitled to a new trial on the seven convictions predicated on his delivery of heroin to other inmates while in jail because the circuit court erred in declining to admit evidence that another inmate delivered heroin in the jail prior to Parisi's arrival. Because we conclude that the circuit court properly exercised its discretion in excluding the proffered evidence, we affirm.

¶2 During a traffic stop on May 23, 2014, Parisi was found to be in possession of narcotics and drug paraphernalia. He was arrested and held in the county jail. On May 28, 2014, Parisi was moved into jail pod DS1 where he recognized inmate Shad Samp from a previous incarceration. Samp had entered the DS1 pod on May 7, 2014. According to the evidence adduced at trial, Parisi told Samp that it had "been the longest six days of his life" but that he had managed to smuggle in some heroin. Samp told T.S., another inmate, that Parisi had heroin and T.S. said "he wanted some." Parisi, Samp and T.S. struck a deal; T.S. agreed to provide canteen items to Parisi, Parisi would give heroin to Samp, and Samp and T.S. would share the heroin. T.S. testified that he talked to Parisi about "payment" for the heroin and that Parisi came to his bunk and selected canteen items as partial payment. Samp testified that Parisi told him he had smuggled heroin into the jail and that Parisi handed him the heroin which he then delivered to T.S.

¶3 T.S. and Samp told other inmates, including Joseph Rooney, that Parisi had heroin in the jail. Rooney expressed interest in buying some heroin so Samp sent Parisi to Rooney's cell. Parisi provided heroin to Rooney in exchange

for a radio and headphones. Rooney testified that he received heroin directly from Parisi.

¶4 Meanwhile, several inmates, including Jeremy Bouchard and Colin Coffin, noticed that T.S. was showing signs of an overdose. Bouchard approached Parisi and said, “I’ve gotta say something to [the guard], man. ... I’ve known [T.S.] since I was six. He’s like family.” Parisi responded that he did not want Bouchard to tell anyone because he did not want to get into trouble. Bouchard and some other inmates reached out to Coffin, who agreed to tell the guard that T.S. was overdosing. T.S. was taken to the hospital and recovered.

¶5 Based on the May 23, 2014 arrest, the State charged Parisi with two counts of possessing narcotic drugs and one count of possessing drug paraphernalia (counts eight through ten). In connection with the May 28, 2014 incident, Parisi was charged with one count of first-degree recklessly endangering safety, three counts of delivering heroin as a party to the crime, and three counts of delivering illegal articles to an inmate as a party to the crime (counts one through seven).

¶6 A week before trial, Parisi filed a motion in limine seeking an order “allowing the Defense to introduce prior bad acts evidence against Shad Samp.” In support, the motion added the following single sentence: “Specifically, the Defense seeks to call Cody Forbes and Braulio Negron to confirm that Shad Samp was selling heroin in [the jail] just before the Defendant arrived at that location.”

¶7 The court heard the motion the morning of trial. Parisi argued that the evidence was relevant to his defense that the State had the wrong person, as it would show that Samp had delivered heroin in the jail. The State countered that the evidence was irrelevant because Negron and Forbes had left the DS1 pod

about a week before the incident; they were not present and had no personal knowledge of the events occurring on May 28, 2014. The circuit court denied Parisi's motion. It agreed with the State that the evidence was irrelevant and also determined that Parisi's motion was untimely.

¶8 The jury found Parisi guilty of all ten counts. The court imposed a global bifurcated sentence totaling seventeen and one-half years, with ten and one-half years of initial confinement followed by seven years of extended supervision.

¶9 Parisi filed a postconviction motion arguing that he was entitled to a new trial on counts one through seven because the circuit court erred in denying his other acts motion. The State responded that the circuit court properly excluded the evidence as irrelevant because neither Forbes nor Negrón had personal knowledge of the events of May 28, 2014. The State further argued that Parisi's claim that Forbes and Negrón would confirm that Samp was selling heroin in the jail just before Parisi's arrival was a "gross exaggeration and mischaracterization of the substance of their written statements taken by the defense investigator." The State attached copies of Forbes's and Negrón's February 2015 statements and pointed out that neither person actually described having seen any heroin, nor did they claim to have witnessed Samp selling heroin. Negrón, for example, stated that he believed T.S. and Samp were drug addicts because that was "[a]ll they talked about," and that though he "never actually saw them with heroin," he thought they were using it in jail because "[t]hey would exchange canteen, little slips of paper, go into the bathroom together and come out looking high." Similarly, Forbes wrote that Samp and T.S. showed signs of drug use such as itching and nodding off, and asserted: "I think this behavior makes it obvious they were doing heroin in jail." Forbes also stated: "I think Shad is the one who got the heroin into the jail. I think it was Shad who had the drugs because, prior to his

arrival at the jail, none of those guys acted like that.” Forbes also asserted that after he beat Samp in a card game, Samp asked if he would rather have dope than canteen, and: “If I had to guess, Shad sold dope to Jeremy Bouchard, [T.S.] and Joe Rooney. It’s not even a guess, I saw those guys bring Shad their canteen.”

¶10 At a hearing, the circuit court determined that the other acts evidence was “probably not” offered for an acceptable purpose, that it was not relevant, and that allowing the other acts evidence would have unfairly prejudiced the State:

I think it would have been prejudicial to the State, in fact, if I let this information in because it would give some credibility, some weight, to a statement for which there’s no basis to give, when people had no personal knowledge of this, they’re saying that they’ve seen people that are high before and therefore they had an opinion that they were high.

The court denied the postconviction motion. Parisi appeals.

¶11 Though character evidence is generally not admissible to show that the person acted in conformity therewith, evidence of a person’s other crimes, wrongs or acts may be admitted for certain purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* WIS. STAT. § 904.04(2)(a) (2015-16).¹ In determining whether other acts are admissible, courts employ a three-part test: (1) the evidence must be offered for an acceptable purpose, (2) the evidence must be relevant, and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The decision whether to admit or exclude other acts evidence is left to the circuit

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

court's sound discretion. *State v. Hunt*, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will uphold its evidentiary ruling if the court “examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach.” *Id.*

¶12 We need not address whether Parisi's proffered evidence was offered for a proper purpose or was relevant. Rather, we conclude that to the extent Parisi's evidence might have had any minimal relevance, the circuit court properly exercised its discretion in determining that its probative value was substantially outweighed by the danger of unfair prejudice. *See State v. Payano*, 2009 WI 86, ¶81, 320 Wis. 2d 348, 768 N.W.2d 832 (the probative value of evidence relates to the relevancy analysis from *Sullivan*'s second prong; “evidence that is highly relevant has great probative value whereas evidence that is only slightly relevant has low probative value”).

¶13 Here, the evidence is, at best, hardly relevant – its probative value is little more than speculative as it relates to the sale of heroin by Samp on the day in question. Evidence is relevant if it “relates to a fact or proposition that is of consequence to the determination of the action” and “has a tendency to make a consequential fact more probable or less probable than it would be without the evidence.” *Sullivan*, 216 Wis. 2d at 785-86; WIS. STAT. § 904.01. Both Negron and Forbes left the DS1 pod one week before Parisi arrived and lacked personal knowledge of the events of May 28, 2014. Additionally, their statements consist of guesswork and supposition. The observations of Negron and Forbes do not establish that there was heroin in the jail pod during the three-week period their incarcerations overlapped with Samp's incarceration, much less that Samp sold heroin to other inmates. Their statements invite speculation and conjecture—neither saw heroin in the jail, neither saw Samp, T.S. or Rooney with heroin,

neither saw Samp sell any heroin, and neither have any knowledge as to what happened on May 28, 2014. Furthermore, multiple witnesses testified that Parisi sold them heroin on May 28, 2014. The proposition that Samp might have also passed drugs does not tend to make it less likely that Parisi delivered drugs on the date in question.

¶14 Unfair prejudice results when the evidence tends to influence the outcome by improper means or causes the jury to base its decision on something other than the established propositions in the case. *State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). Where the defendant is the proponent, prejudice to the State may arise from the State's significant interest in preserving orderly trials, in preventing undue diversion of the trial by injecting a collateral issue, and in avoiding unsupported jury speculation regarding the guilt of other suspects.

¶15 Here, the circuit court could reasonably determine that the low probative value of Parisi's evidence was substantially outweighed by other considerations, particularly the danger it would confuse the issues, mislead the jury, and invite a verdict based on improper speculation. *See* WIS. STAT. § 904.03 (relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time").

¶16 Forbes and Negron gave statements relating to their time in the DS1 pod, which ended respectively on May 21 and 22, 2014. Their statements discussed interactions with Samp, T.S., and Rooney. Samp arrived in the pod on May 7, 2014, while Parisi did not arrive until May 28, 2014. Seven inmates who were in the DS1 pod on May 28, 2014, including Samp, T.S., and Rooney,

testified at trial. Keeping the facts straight, including the relevant dates and the movement and interactions of those seven inmates, was already a difficult task for the jury. Adding Forbes and Negron to the mix would have injected unnecessary confusion. Further, as the postconviction court properly recognized, admitting Parisi's evidence would have given "some credibility, some weight, to a statement for which there's no basis to give." The statements of Forbes and Negron consisted of guesswork and speculation and allowing their testimony would have invited the jury to place undue import on information that was useless, or, at best, marginally probative.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

